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International Law -- Liability of a Foreign Sovereign to Counterclaim in Federal Courts

soned that even if the action in Korea should be found to be a war, it is at most an *undeclared* war. If the defendant insurance company intended the term "war" to include *undeclared* war its intentions should have been made clear in unambiguous terms. This has been done[12] by other insurance companies since the "Pearl Harbor Cases."[13]

Not being concerned with the *actualities* of the hostilities in Korea, the court's conclusion that they do not constitute a war seems to be well supported. The case also serves to emphasize that where private parties have occasion to contract with reference to war, the term "war" will be construed in its legal sense unless the parties give it some other definition or meaning by contract.

INTERNATIONAL LAW—LIABILITY OF A FOREIGN SOVEREIGN TO COUNTERCLAIM IN FEDERAL COURTS

Defendants counterclaimed in a United States District Court for libel. Plaintiffs, a foreign nation, moved to have the counterclaim dismissed, asserting sovereign immunity. *Held*, a counterclaim *not arising out of the same transaction would be dismissed. Republic of China v. Pang-Tsu Mow*, 105 F. Supp. 411 (D.D.C. 1952).

Until the early eighteenth century no offset of one debt against another was allowed unless the debts were mutually connected.[1] In the latter part of the eighteenth century a right of set-off in bankruptcy was allowed to abolish certain injustices.[2] Subsequently, statutes pertaining to set-off were enacted governing the right to counterclaim in *any* suit.[3] These statutes tended to confuse the federal courts who failed to distinguish counterclaim, recoupment and set-off.[4]

Recoupment and set-off are derived from the English common and statutory law whereas counterclaim is purely of code origin.[5] Recoupment arose out of the same transaction which formed the basis of the plaintiff's

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security." (Under the authority of this article the Security Council resolution of June 27, 1950 recommended "that members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area."); Vol. XXIII, No. 574 Dep't State Bull. 5 (July 3, 1950) (the President's action seeks to accomplish the objective of the Security Council resolution).

12. Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948).

13. See note 9 *supra*.

1. 78 Ir L.T. 93 (1944); 26 Harv. L. Rev. 490 (Supp. 1932).

2. Stat. 4 & 5 Anne. c. 4 (1705); Stat. 5 Geo. 1, c. 24 (1718); Stat. 5 Geo. 2, c. 30 (1731).

3. Com. Law Procedure Act § 83 (17 & 18 Vict. c. 125) (1854); *In re* Cross, 265 Fed. 769 (N.D. N.Y. 1920); Bankers v. Jarvis, 1 K.B. 549 (1903); 29 Halsbury's Laws of Eng. 482 n. (u) (2d 1938).

4. 25 Minn. L. Rev. 801 (1940); 26 A.J. Int. L. 493 (Supp. 1939).

5. Judicature Act § 24 (1873); 2 Geo. II c. 22 (1728); Curtis-Warner Corp. v. Thirkettle, 99 N.J. 806, 134 Atl. 299 (1926); Halsbury's Laws, *supra* note 4.

action. It was purely defensive, limited to the amount of plaintiff's claim, and was not barred by the statute of limitations.[6] Set-off, on the other hand, arose out of a different transaction. It was not limited to the plaintiff's claim and would constitute an affirmative defense against which a statute of limitations would run.[7] Today, statutes and procedural rules express counterclaim as a combination of common law recoupment and set-off.[8] The presently effective rule governing permissive counterclaim in the federal courts declares that "a pleading may state as a counterclaim *any* claim against an opposing party *not arising out of*[9] the transaction or occurrence that is the subject matter of the opposing party's claim."[10] Whether a strict or liberal interpretation of this rule is employed, it must be conceded that it allows set-off as well as recoupment.

Notwithstanding the clarity of this rule of procedure, courts take exception when a foreign sovereign is a party to the suit.[11] Such a holding which is at variance with a seemingly self explanatory rule is justified on a jurisdictional basis. The adoption of the said rule by the Supreme Court, under powers granted in the Enabling Act,[12] states that rule 13(b) is subject to rule 82[13] which declares that no rule of the court can extend or abridge federal jurisdiction.[14] A determination of jurisdiction is there-

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6. WATERMAN' SET-OFF, RECOUPMENT AND COUNTERCLAIM (2d ed. 1938); POMEROY, CODE REMEDIES § 607 (5th ed. 1929).

7. WATERMAN, SET-OFF, RECOUPMENT AND COUNTERCLAIM 1, 276, 425 (2d ed. 1938); POMEROY, CODE REMEDIES § 607 (5th ed. 1929).

8. FED. R. CIV. P. 13; 28 U.S.C. § 723 (1948); FLA. STAT. § 52.11 (1951); *In re* Cross, 265 Fed. 769, 774 (N.D. N.Y. 1920); First Nat. Bank of Rocky Ford v. Lewis, 57 Colo. 124, 139 Pac. 1102, 1103 (1914); Fricke v. W. E. Frittener Battery & Supply Co., 220 Mo. App. 623, 288 S.W. 1000, 1002 (1926); Williams v. Williams, 192 N.C. 405, 135 S.E. 39 (1926); Curtis-Warner Corp. v. Thirkettle, 99 N.J. 806, 134 Atl. 299 (1926); Sturtevant v. Dawson, 110 Ore. 155, 219 Pac. 802, 804 (1923).

9. *Italics supplied.*

10. FED. R. CIV. P. 13 (b).

11. Kingdom of Roumania v. Guaranty Trust Co. of N.Y., 250 Fed. 341 (2d Cir. 1918); United States v. New York Trust Co., 75 F. Supp. 583 (S.D. N.Y. 1946). In equity the courts base their decision on FED. EQUITY RULE 30, 28 U.S.C. § 723 *e.g.*, United States v. Nat. City Bank of N.Y., 83 F.2d 236 (2d Cir. 1936); Republic of China v. American Express Co., 195 F.2d 230 (2d Cir. 1951) (This case relied on the *Thekla* case wherein the United States was a party to the suit. Observe that if the law concerning sovereign immunity as to the counterclaims applies to the United States it will also apply to a foreign sovereign, but if the law does not apply to the United States it does not mean that it will not apply to a foreign sovereign). French Republic v. Inland Nav. Co., 263 Fed. 410 (E.D. Mo. 1920); *See* McLean v. Commonwealth, 293 Fed. 192 (9th Cir. 1923). Local state procedural law is also applied. However, based on the reasoning of this note, its correctness is questionable. Republic of Haiti v. Plesch, 73 N.Y.S.2d 645 (1947). *See* Irish Free State v. Guaranty Safe Deposit Co., 212 N.Y. Supp. 421 (1925). *But see* Kingdom of Norway v. Fed. Sugar Refining Co., 286 Fed. 188 (S.D. N.Y. 1923).

12. The Enabling Act of June 19, 1934 authorized the Supreme Court of the United States to prescribe general rules for the federal courts.

13. FED. R. CIV. P. 82; BARRON & HOLTZOFF, FED. PRACT. & PROCEDURE, Adv. Comm. Reports, vol. 3 p. 675, vol. 1 p. 789.

14. Hurn v. Oursler, 289 U.S. 238 (1933); Keys Fibre Co. v. Chaplin Corp., 76 F. Supp. 981 (S.D. Me. 1947); Brandsdall Refining Corp. v. Birnamwood Oil Co., 32 F. Supp. 314 (E.D. Wis. 1940); Staude Mfg. Co. v. Berles Carton Co., 32 F. Supp. 572 (E.D. N.Y. 1940).

fore necessary before any claim can be filed against an opposing claimant. Any counterclaim requiring independent jurisdiction, such as an affirmative permissive counterclaim, must be excluded unless the court has, apart from the suit in litigation, independent jurisdiction over said claim.[15] Without this verification as to jurisdictional limitation, procedural rule 13(b)[16] would mislead one into believing that the court could litigate any counterclaim so long as it had jurisdiction over the initial suit.

In dealing with counterclaim, it is recognized that independent grounds of jurisdiction are not necessary when a counterclaim arises out of the same transaction,[17] nor, if permissive, when it is in the nature of a defense rather than an affirmative claim.[18] But any permissive counterclaim that is unconnected with the transaction requires an independent ground of jurisdiction before the court can litigate the claim.[19] In the instant case, the sovereign plaintiff moved to dismiss a permissive counterclaim on the basis of immunity. The court granted the motion on the ground that a friendly sovereign subjects itself to counterclaim only to the extent of recoupment. The court cites no authority for its decision. However, in effect, the decision recognized a limitation of jurisdiction as to claims that do not arise out of the same transaction to which the sovereign has consented to litigate.

The federal court, having no independent ground of jurisdiction over claims wherein a foreign sovereign is a party to the suit, has no authority to litigate the claims without the consent of the sovereign.[20] Consent grants jurisdiction. However, consent to litigate a certain transaction does not constitute consent to litigate independent claims. There being no jurisdiction over independent claims, the sovereign is within its inherent right to refuse such claims for lack of jurisdiction.[21] This leaves the sovereign liable to the extent of common law recoupment, a claim arising out of the initial transaction to which the sovereign agreed to litigate. This is no new version of the rule, it simply states its limitations. Rule 13(b) is substantially a broadened rule of Federal Equity Rule 30[22] and it applies to private litigants as well. Whether with foreign nations, as a concern of sovereign immunity; or private suitors, as a concern of ordinary

15. Kuster Laboratories v. Lee, 10 F.R.D. 350 (D.C. Cal. 1950); Lesnik v. Public Industrials Corp., 144 F.2d 968 (2nd Cir. 1944); 45 YALE L.J. 393 (1936).

16. See note 12 *supra*.

17. U. OF PITT. L. REV. 1, 17, 19 (1940).

18. Rubsam v. Harley C. Loney Co., 86 F. Supp. 350 (E.D. Mich. 1949); Marks v. Spitz, 4 F.R.D. 348 (D.C. Mass. 1945).

19. Jewish Consumptives Relief Soc. v. Rothfield, 9 F.R.D. 64 (D.C. N.Y. 1949); McCarthy v. M & M Transp. Co., 5 F.R.D. 290 (D.C. Mass. 1946); 15 TENN. L. REV. 570 (1939).

20. Monaco v. Mississippi, 292 U.S. 313 (1934); Republic of China v. American Express Co., 195 F.2d 230 (2nd Cir. 1951); 35 YALE L.J. 150 (1935).

21. CLARK, CODE PLEADING 644 (2d ed. 1947).

22. General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932); American Mills Co. v. American Surety Co., 260 U.S. 360 (1922); Carter Oil Co. v. Wood, 30 F. Supp. 875 (E.D. Ill. 1940).

federal jurisdiction over the subject matter, if the courts fail to have the necessary independent jurisdiction over the affirmative claim, a counterclaim will be limited to "a claim arising out of the same transaction as that upon which suit was brought."[23]

MUNICIPAL CORPORATIONS—DISCRIMINATION BETWEEN RESIDENT AND NON-RESIDENT USERS OF PUBLIC UTILITIES

A non-resident user of the water and sewage system sought to enjoin the municipality from raising the water rate one and a half times the rate charged residents and raising the sewage rate to double that charged residents. *Held*, the municipality could not charge non-residents higher taxes solely because they were residing outside of the corporate limits. *City of Texarkana v. Wiggins*, 246 S.W.2d 622 (Texas 1952).

The earliest cases on the reasonableness of rates dealt chiefly, if not exclusively, with private corporations.[1] As a result, it is well settled that a private corporation doing a public service cannot charge discriminatory or unreasonable rates to customers in the same class.[2] With the development of municipal ownership of formerly private utility companies, the question arose as to the rights and duties of a city in regard to the rates charged. These rights and duties, in general, have been decided to be neither more nor less than those held by a private corporation.[3] However, when faced with the instant problem, discrimination against non-residents, courts[4] have

23. FED. R. CIV. P. 13 (g); see FED. R. CIV. P. 82. See note 10 *supra*.

1. San Diego Land & Town Co. v. City of National City, 74 Fed 79 (C.C.S.D. Cal. 1896); City of Council of Montgomery v. Capital City Water Co., 92 Ala. 376, 9 So. 337 (1890); City Council of Montgomery v. Montgomery Waterworks Co., 77 Ala. 248 (1884); Spring Valley Waterworks v. City and County of San Francisco, 52 Cal. 111 (1877); Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068 (1890); Nicholasville Water Co. v. Board of Councilmen of Town of Nicholasville, 36 S.W. 549 (Ky. 1896); Borough of Carlisle v. Carlisle Gas & Water Co., 4 Atl. 179 (Pa. 1886).

2. Danville v. Danville Water Co., 180 Ill. 235, 54 N.E. 224 (1899); State *ex rel* Latshaw v. Water & Light Comm'rs, 105 Minn. 472, 117 N.W. 827 (1908); Griffin v. Goldsboro Water Co., 122 N.C. 206, 30 S.E. 319 (1898); Armour Packing Co. v. Edison Electric Illuminating Co., 115 App. Div. 51, 100 N.Y. Supp. 605 (3d Dep't 1926); Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N.E. 121 (1896).

3. Montgomery v. Greene, 180 Ala. 322, 60 So. 900 (1913); Nourse v. Los Angeles. 25 Cal. App. 384, 143 Pac. 801 (1914); American Aniline Products v. Lock Haven, 288 Pa. 420, 135 Atl. 726 (1927); Galveston v. Kenner, 111 Tex. 484, 240 S.W. 894 (1922).

4. City of Phoenix v. Kasun, 97 P.2d 210 (Ariz. 1939); Durant v. City of Beverly Hills, 39 Cal. App.2d 133, 102 P.2d 759 (Cal. 1940); City of Englewood v. City & County of Denver, 123 Colo. 290, 229 P.2d 667 (1951); Cooper v. Tampa Electric Co., 154 Fla. 410, 17 So.2d 785 (1944); Barr v. City Council of Augusta, 206 Ga. 753, 58 S.E.2d 873 (1950); Davisworth v. City of Lexington, 311 Ky. 606, 224 S.W.2d 649 (1949); Louisville & Jefferson County Metropolitan Sewer Dist. v. J. E. Seagram & Sons, Inc., 307 Ky. 413, 211 S.W.2d 122 (1948); Atlantic Const. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949); Borough of Ambridge v. Pennsylvania Public Utility Comm'n, 137 Pa. Super. Ct. 50, 8 A.2d 429 (1939); Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911); City of Sweetwater v. Hamner, 259 S.W. 191 (Tex. Civ. App. 1923).